

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412400

BILLY J. LEACH, EMPLOYEE	CLAIMANT
ENTERPRISE PRODUCTS COMPANY, EMPLOYER	RESPONDENT
ESIS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 19, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on July 27, 2007, at Jonesboro, Craighead County, Arkansas

Claimant represented by Mr. Joe M. Rogers, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 27, 2007, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on June 13, 2007, and a Prehearing Order was filed on said date. In addition, this claim has been the subject of prior proceedings, including a hearing conducted on July 1, 2005, to determine compensability of the claim. An Opinion was issued by the Administrative Law Judge on August 24, 2005, which was subsequently affirmed and adopted by the Full Workers' Compensation Commission in an Opinion issued January 13, 2006. Said decisions are now final and the law of the case. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order filed June 13,

2007. A copy of the Prehearing Order was introduced as “Commission’s Exhibit 1.”

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the claimant sustained any permanent impairment as the result of his admitted injury.
- 2) If answered affirmatively, the extent of claimant’s permanent impairment.
- 3) Claimant’s entitlement to wage-loss disability.
- 4) Whether respondents were responsible for the costs of claimant obtaining a physician’s impairment rating.
- 5) Claimant’s entitlement to continued medical treatment.

Claimant contended, in summary, that he was entitled to permanent partial impairment benefits in accordance with the impairment rating assigned by Dr. Floyd Shrader; that, in addition, he was entitled to wage-loss disability in an amount to be determined by this Commission; that he was entitled to be reimbursed for the cost of obtaining the impairment rating; and that he was entitled to continued medical treatment for chronic pain associated with the compensable injury. Claimant requested a controverted attorney’s fee on any additional disability benefits awarded.

The respondents contended that all appropriate benefits had been paid in this claim; that the claimant had not presented valid evidence of permanent partial impairment and was, therefore, not entitled to any impairment benefits. In the event

the claimant was able to establish some degree of permanent partial impairment, respondents maintained that he was not entitled to wage-loss disability. Respondents contended that the claimant's impairment and/or disability were all associated with his pre-existing condition rather than the admitted injury. Alternatively, respondents contended that under the AMA Guides, Fourth Edition, the claimant would be entitled to either an eight percent (8%) impairment or a ten percent (10%) impairment if the claimant had medical documentation indicating radiculopathy while asserting that it had no medical documentation indicating radiculopathy subsequent to the claimant's surgery on January 13, 2005. Respondents also contended that additional medical treatment was not reasonably necessary. Finally, respondents contended that they were not responsible for claimant's procurement of his own impairment rating.

The claimant was the only witness to testify. The record is composed solely of the transcript of the July 27, 2007, hearing containing numerous exhibits. The record of the prior hearing, together with the Opinions of record filed in this claim are incorporated by reference and made a part of the record herein.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. On June 13, 2003, the claimant sustained a compensable injury which arose out of and during the course of his employment with Enterprise Products Company, at which time he earned sufficient wages to entitle him to the maximum applicable compensation rates of \$440.00 per week for temporary total disability and \$330.00 per week for permanent partial disability.
3. The claimant's healing period ended April 1, 2005. Respondents have paid all appropriate temporary total disability, to date, pursuant to prior decisions in this claim which are now final and the law of the case.
4. A preponderance of the credible evidence, together with workers' compensation case law, establishes that the claimant is entitled to permanent impairment benefits as the result of his admitted, compensable injury of June 17, 2003, and resulting surgery.
5. The claimant is entitled to a ten percent (10%) permanent impairment for his single-level spinal fusion pursuant to the *AMA, Guides to the Evaluation of Permanent Impairment*, Fourth Edition, specifically, table 75, section IV(D).
6. The claimant has proven, by a preponderance of the credible evidence, that he has sustained a fifteen percent (15%) wage-loss disability in excess of his permanent impairment for an overall permanent partial disability of twenty-

five percent (25%) to the body as a whole.

7. The respondents are not responsible for the costs of the claimant obtaining a physician's impairment rating from Dr. F. R. Schrader, which the claimant obtained at his own expense.
8. The claimant has failed to prove, by a preponderance of the evidence, that he is entitled to continued medical treatment.
9. Respondents have controverted this claim in its entirety for purposes of attorney's fees.

DISCUSSION

_____The relevant facts in this case are basically undisputed. As previously noted, this claim was the subject of a prior hearing which was conducted on July 1, 2005. The primary issue presented for determination at the prior hearing concerned compensability. In an Opinion issued on August 24, 2005, the Administrative Law Judge found that the claimant sustained a compensable injury in the form of an aggravation of a pre-existing condition which arose out of and during the course of claimant's employment with Enterprise Products Company as the result of a specific incident identifiable in time and place of occurrence on June 19, 2003. Rather than conduct an exhaustive analysis of the prior record, suffice it to say that following the injury, the claimant continued working and missed only three (3) weeks of work, specifically, from July 2, 2003, through July 22, 2003, before being forced to take off work and undergo surgery. In fact, the claimant underwent a cervical fusion at

C6-7 on January 13, 2005. In the prior Opinion, it was found, *inter alia*, that respondents were responsible for all medical and related treatment as the result of the June 17, 2003, injury and remained responsible for continued, reasonably necessary medical treatment and, further, that the claimant was entitled to temporary total disability benefits for the period beginning July 2, 2003, and continuing through July 22, 2003, and again for the period beginning November 9, 2004, and continuing through April 1, 2005, at which time claimant's healing period was determined to have ended. Respondents appealed the decision of the Administrative Law Judge. In an Opinion filed January 13, 2006, the Full Workers' Compensation Commission affirmed and adopted the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein.

At the time of the prior hearing, the claimant had returned to work and was, in fact, working for the respondent employer herein. At the time of claimant's injury, he drove a tanker truck. His work required him to deliver fuel and pull large hoses, as well as load and unload the hoses. The work was extremely strenuous and required him to pull as much as one hundred (100) foot of two (2) inch hose. Following the surgery, the claimant was released to return to work on April 1, 2005, at which time he went back to performing his pre-injury duties. The claimant testified that the work caused him additional problems. He maintained that he reported his physical problems to his employer. In addition, the claimant stated that he requested reassignment to less strenuous work which was ignored and that he

eventually voluntarily terminated the employment. I found the claimant to be an extremely credible witness. It must be pointed out that following the initial injury on June 17, 2003, as well as following an extremely short recovery period after surgery, the claimant exhibited an extremely strong work ethic. It is my fervent belief that the strenuous work duties of driving a tanker truck exceeded what would reasonably be expected of someone having undergone a cervical fusion. A portion of the claimant's credible testimony is set out below:

Q Now, how long after that – you returned to work on or about April the 1st of '05?

A Yes, sir, the 3rd to be exact right.

Q April the 3rd, '05, working for Enterprise?

A Yes, sir.

Q And what type of job did they put you back to when you were returned to work?

A Very strenuous jobs to where I was required to pull as much as a hundred foot of two inch hose.

Q And before I get into that, I know we have the medical records in evidence, but did you get – as a result of the injury that you had, you had neck pain and arm pain primarily, is that correct?

A Yes, sir.

Q And did the surgery that you had – how did that affect the relief of your neck and your arm pain?

A Until I went back to work, it was a considerable relief. Once I go back to work –

Q Now, when you went back to work for Enterprise, again, they put you back to work hauling – you were pulling a tanker, correct?

A Yes, sir. Yes, sir.

Q And this requires you to manually handle a lot of hoses that weighed substantial amounts of weight?

A Yes, sir.

Q Could you describe that in detail for the Judge?

A The hoses are two and three inch hoses, heavy rubber, metal connections on the end, extremely heavy when full of product.

Q They are hooked up to the tanker you're pulling?

A You hook it to your pump on your tanker and then you put it on the customer's container, his tank. You have, like I said, 20 foot sections. You put 20 foot, 20 foot, 20 foot, until you reach his tank.

Q All right. And how do you – when you're doing this job that you were doing after you returned to work, what does that require you to lift, physically do?

A You have to lift the hoses off the back of your truck.

Q They're empty when you lift them off?

A They're empty when you lift them off.

Q How much do they weigh when you're doing this?

A The empty weight of a two inch hose is very little. The three inch hoses are more. Then you are using a pump to unload. Your hoses are full. You can't get it out of your hose. So you have to lift 20 foot of two inch hose that's full of product.

Q You are doing this generally by yourself?

A Yes, sir.

Q And what weights are we lifting there, sir?

A The hoses can be well over 100 pounds.

Q Now, when you began and you were put back to doing that kind of work, did

you register a complaint to your employer?

A Yes, I did.

Q Who was the person that you were dealing with at your place of employment?

A At that time, Larry Scruggs.

Q All right. Now, Mr. Scruggs, is he a dispatcher? Was that his title?

A Manger at the time.

Q He had been the manager when you had your injury originally, was he not, sir?

A Yes, sir.

Q So when you returned back on April the 1st of '05, he continued to be the manager?

A Yes, sir.

Q Now, you registered complaints to him that this lifting was causing you problems?

A Yes, sir.

MR. PARRISH: Your Honor, can I object. I don't mind the leading to the background information, but if we are going to get to the heart of the issue, I object to his leading questions.

BY MR. ROGERS:

Q What did you tell Mr. Scruggs about any problems you were having, sir, after you returned to work in April of '05?

A I explained to him that the heavy lifting of the hoses was aggravating my surgery, where I had had the surgery. I requested other assignments to where I wasn't needing to use that many hoses. I also requested he keep me out of the Northeast due to the road conditions.

Q So you traveled all over the country?

A Yes, sir.

Q And it also took you to the Northeast?

A Yes, sir.

Q Now, what is it about the rough road conditions in the Northeast, how did that affect your injury and problems you had?

A Bouncing, a lot of bouncing, which aggravates your loads, your tanks. There's no baffle in the tank. You've got 45,000 pounds of liquid that's sitting there just slamming you back and forth.

Q How does that affect you bodywise as far as what injuries you have suffered?

A Aggravated it considerably. It was basically the same problem I had in the beginning, like the two disks were slamming on a nerve.

Q How did that feel to you, sir?

A Severe pain in the neck, numbness and pain in my arm.

Q And did you report that to your employer?

A Yes, I did.

Q What did Mr. Scruggs say to you, if anything?

A If I couldn't do the job, I didn't need to be working there, repeatedly.

Q Now, how long did you continue to work under those conditions?

A Until the end of August.

Q Of '05?

A Yes, sir.

Q And where were you when you made the decision that you couldn't do the work anymore?

A Midland, Michigan.

Q I see. What was the physical problems that you were having, if any, at that time?

A I had been sitting in a truck for two days, and just sitting in the seat, the pain just kept progressively worsening. And I called the – they had a new manager, part-time manager at the time, and I informed him that I would be quitting when I got back in. I couldn't deal with the pain anymore. (Tr.16-20)

The claimant is sixty (60) years old. He completed nine (9) years of formal schooling and then obtained a GED. The claimant joined the military where he received training as an aircraft mechanic. The claimant was in the military from 1965 through 1985, at which time he retired. After retiring from the military, the claimant obtained some limited training as both an electrician, as well as heating and air conditioning work, but did not complete either course. He began truck driving as a vocation in 1989. He began working for the respondent herein in December, 2001, which continued through August, 2005, except for the interrupted period of time following his work-related injury on June 17, 2003. The claimant testified that after he terminated his employment with Enterprise Products, and because his claim was still in litigation, he was required to sell all of his possessions because he could not live off his military retirement, and that he moved to the Dominican Republic where he lived from August, 2005, through March, 2006. The claimant then moved to Honduras for two (2) months and then returned to the Dominican Republic where he lived until March, 2007, at which time he returned to the United States. The claimant has not been gainfully employed since August, 2005. The claimant acknowledged receiving a lump sum payment of accrued

benefits on or about March, 2006, following the Full Commission decision in his claim.

As reflected by the Prehearing Order filed June 13, 2007, several issues have been presented for determination. A procedural history following the Full Commission decision issued January 13, 2006, is warranted. On July 27, 2006, claimant's attorney wrote the adjustor for the third-party administrator of this claim, requesting that the claimant be scheduled a medical examination to determine his permanent disability rating. Follow-up requests were made to seek an impairment rating . Eventually, claimant's attorney requested that the Commission order respondents to provide the claimant with an examination to determine an impairment rating. (Cl. Ex. B, pp.1-4)

The claim was then assigned to this Administrative Law Judge and a prehearing telephone conference was conducted on May 2, 2007, and a Prehearing Order was filed on said date. At that time, the parties agreed to litigate two (2) issues:

- 1) Whether the claimant was entitled to an examination and evaluation from an authorized neurosurgeon to assess the extent of claimant's permanent impairment related to his June 17, 2003, compensable injury.
- 2) The extent of claimant's permanent impairment, if any, related to the admitted injury.

In fact, a hearing was scheduled for May 18, 2007, on these limited issues. However, prior to the scheduled hearing, the claimant's attorney requested a continuance of the hearing to joint additional issues. By agreement of both parties,

another prehearing conference was scheduled for June 13, 2007. Prior to the June 13, 2007, prehearing conference, claimant's attorney obtained a May 24, 2007, report from one Dr. F. R. Schrader, assessing permanent impairment. At the June 13, 2007, prehearing conference, the issues were changed and expanded as reflected above.

The first issue presented for determination was whether the claimant sustained any permanent impairment as the result of his admitted injury.

Respondents contend that the claimant's impairment and/or disability are all associated with his pre-existing condition rather than the admitted injury. Respondents maintain that the aggravation the claimant sustained while employed with the respondents was not the major cause of his permanent impairment, citing various decisions, in support of its position. Respondents' contention is totally without merit. The injury that the claimant sustained while working for the respondents herein required the claimant to eventually undergo a cervical fusion. Respondents were responsible for the cost of the surgery and any disability related thereto. The Arkansas Court of Appeals has clearly held that an aggravation of a pre-existing condition is capable of meeting the major cause requirement. Further, the Court held that if the aggravation caused a need for surgery, that was sufficient to entitle the claimant to permanent impairment and/or disability benefits. See, *Pollard v. Meridian Aggregates*, 88 Ark. App. 1, 193 S.W.3d 738 (2004).

EXTENT OF CLAIMANT'S PERMANENT IMPAIRMENT

Since it is herein concluded that the claimant has proven, by a preponderance of the credible evidence, that he sustained permanent impairment as the result of his admitted injury and resulting surgery, the next issue which must be addressed concerns the extent of claimant's permanent impairment.

The claimant contends, in summary, that he is entitled to a twenty-four percent (24%) whole body impairment assessed by Dr. Floyd R. Schrader on May 24, 2007. As an alternative contention, respondents maintain that under the *AMA Guides*, Fourth Edition, the claimant would be entitled to either an eight percent (8%) impairment or a ten percent (10%) impairment while further asserting that because the claimant has failed to produce medical documentation indicating radiculopathy subsequent to claimant's surgery of January 13, 2005, the appropriate rating would be eight percent (8%) to the body as a whole.

First, I find respondents' arguments to be disingenuous at best. I feel compelled to point out that respondents, at all times, frustrated the claimant's attempts to obtain a physical examination and evaluation by an authorized treating physician to assess the claimant's impairment. Additional diagnostic studies would have been a reasonable consideration to determine whether the claimant, indeed, continued to experience radiculopathy consistent with his testimony at the hearing. The claimant's undisputed testimony was that work caused him to experience pain and numbness in his arm.

I feel compelled to further point out that the EMG studies taken prior to the claimant's surgery reflected acute right C7 radiculopathy. Further, the last office visit that the claimant had with his treating surgeon was on March 9, 2005, six (6) plus weeks post-anterior cervical discectomy and fusion at which time Dr. Hudson's notes reflect that the claimant still rarely does experience arm pain. Nevertheless, Dr. Hudson released the claimant to return to work on April 1, 2005, to return on an as needed basis. (Cl. Ex. A, pp.11, 23)

In my opinion, Dr. Schrader properly assessed a ten percent (10%) impairment utilizing the AMA, *Guides to the Evaluation of Permanent Impairment*, Fourth Edition, table 75, section IV(D); however, the remainder of Dr. Schrader's assessment is not based upon objective and measurable findings. The record reflects that the claimant has never been examined by Dr. Schrader or had any personal contact with Dr. Schrader. (Tr.45-46)

WAGE-LOSS DISABILITY

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232,58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Emerson Electric v. Gaston, supra*.

In determining wage-loss disability, the Commission may take into

consideration the worker's age, education, work experience, medical evidence, and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A claimant's lack of interest in pursuing employment with other employers and negative attitude in looking for work are impediments to our full assessment of wage-loss. *Emerson Electric v. Gaston*, *supra*.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Finally, Ark. Code Ann. §11-9-102(4)(F)(ii) (Repl. 2002) provides:

- (a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.
- (b) If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. §11-9-102(14) (Repl. 2002).

The claimant is sixty (60) years old. His primary work experience has

consisted of aircraft mechanic for twenty (20) years and as a long-distance truck driver. At the time of claimant's injury, he was driving a tanker truck, pulling hoses which is an extremely physically demanding job. In my opinion, the claimant's injury and cervical fusion prevent him from engaging in physically demanding jobs. After consideration of the claimant's age, education, work experience, together with the medical evidence reflecting a significant impairment of ten percent (10%) to the body as a whole, I find that a wage-loss disability of fifteen percent (15%) to the body as a whole fairly and accurately reflects claimant's entitlement to wage-loss disability.

The only remaining issues concern claimant's entitlement to continued medical treatment, as well as a determination concerning whether respondents are responsible for the cost of claimant obtaining a physician impairment rating from Dr. Schrader.

Concerning the cost of obtaining a report from Dr. Schrader, suffice it to say that this report was generated, and obtained to support the claim for anatomical impairment benefits. Clearly, this Commission has the authority to order an independent medical examination if it is reasonably necessary, pursuant to Ark. Code Ann. §11-9-511. In fact, a hearing was scheduled on May 18, 2007, to address this issue. Understandably, the claimant elected to continue the hearing and obtain an impairment rating at his own expense which is the claimant's right. Either party can, at any time, obtain its own medical evidence. However, any such

evidence is not a truly independent medical exam and must be borne by the party obtaining the report.

The only remaining issue concerns claimant's entitlement to continued medical treatment.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The record reflects that the only medical that the claimant requested from respondents was a medical examination to determine his permanent impairment rating which the claimant subsequently abandoned by seeking an impairment rating on his own. The claimant's decision to seek his own impairment rating is understandable, given the foreseeable delays in the adjudication process which potentially exist if appeals are taken by either party on this limited issue. Clearly, respondents could have acted in good faith by meeting its obligations under our

workers' compensation laws in securing a final surgeon's report requesting an impairment rating, and filing an appropriate Commission Form AR-3. Such forms are provided and encouraged to be filed, but not a mandatory form required by the workers' compensation rules. The reason respondents failed and/or refused to seek a final physician's report is obvious. It was clear that the claimant sustained permanent impairment as a result of his surgery. Obtaining such a report and filing it with the Commission would have obligated respondents to pay appropriate impairment benefits.

Despite the foregoing dicta, there is no credible evidence that the claimant has requested or needs continued medical treatment at this time. It is apparent that the claimant's physical condition is stable and permanent. In fact, the claimant candidly acknowledged that the only time he experiences symptoms is when he performs activities beyond his physical ability. The record fails to reflect that the claimant requires any ongoing maintenance care. Accordingly, the claim for continued medical treatment must be respectfully denied and dismissed.

In light of the foregoing, I hereby make the following:

AWARD

_____ Respondent, ESIS, is hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$330.00 per week beginning April 2, 2005, and continuing for 112.5 weeks, representing a twenty-five percent (25%) permanent partial disability, specifically, a ten percent (10%) permanent impairment

and a fifteen percent (15%) wage-loss disability.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Additionally, claimant's attorney, Mr. Joe M. Rogers, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge